Alex R. Thomas & Co., Inc. and Rosa Mireles. Case 20–CA–28296

January 31, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On September 24, 1998, Administrative Law Judge Joan Wieder issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed cross-exceptions and a supporting brief. All parties filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Maroaret Dietz, Esq., for the Acting General Counsel.

Charlotte Addinaton. Esq. (Kauff, McClain & McGuire), of San Francisco, California, for the Respondent.

Caleb A. Rush, Esq. (Redwood Legal Assistance, Southern Office), of Ukiah, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried on July 1, 2, and 9, 1998, ¹ at Ukiah and San Francisco, California. Rosa Mireles, an individual, filed the charge on February 5, 1998, against Alex R. Thomas & Company, Inc. (Respondent or the Company). The complaint, as amended, alleges Respondent violated Section 8(a)(1) of the Act by laying off employees Rosa Mireles and Hilda Mireles and refusing to rehire them to work both the postharvest and 1998 harvest seasons, because they engaged in protected concerted activity.

Respondent's timely filed answer to the complaint, as amended, admits certain allegations, denies others, and denies any wrongdoing. Respondent asserts Rosa and Hilda Mireles did not engage in any concerted protective activity, it did not take any retaliatory action against any employee, and Rosa and Hilda Mireles voluntarily quit.

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Counsel for the Acting General Counsel and Respondent filed timely briefs on or before August 14, 1998. The brief of the Charging Party was late filed, being submitted on August 17, 1998. The Charging Party moved to have the late brief accepted because he failed to allow sufficient time to personally deliver the brief.

Specifically, he failed to consider Friday rush hour traffic when he finished the brief at about 2:30 p.m. on Friday, August 14, 1998, and determined since he had to travel from his office in Ukiah to San Francisco for reasons unrelated to this proceeding, that he would personally deliver the brief. Respondent opposes the motion on the grounds the Charging Party failed to demonstrate excusable neglect. Respondent argues the Charging Party's counsel did not complete the brief until 2.30 p.m. and he did not leave for San Francisco until 2:45 p.m., the afternoon the briefs were due; he knew he could not drive approximately 110 miles to San Francisco through Friday afternoon rush hour traffic, park, and timely deliver the brief. Respondent maintains the brief could have been timely filed if finished earlier and there were admittedly quicker methods of filing.

Inasmuch as Respondent admits it will not be prejudiced if the motion to consider the Charging Party's brief, filed the next business day after the due date, is granted, I grant the motion to accept the late filed brief of the Charging Party. All parties should be afforded the reasonable opportunity to fully present their positions. *Daisy's Orginals, Inc.*, 187 NLRB 251 (1970); *World Publishing Co.*, 220 NLRB 1065 (1975); *Downtowner Motor Inn*, 262 NLRB 1058 (1982); and *First Termite Control Co.*, 265 NLRB 1558 (1962).

Counsel for the Acting General Counsel filed a brief on August 14, 1998, but noted some transcript citations were in error due to pagination differences between the hard copy of the transcript and the computer disk. Counsel for the Acting General Counsel moved to file a corrected brief, wherein the only changes were to the citations to the transcript. This motion was unopposed. Inasmuch as there was no showing of prejudice, no opposition, and no changes to the statements of fact and argument, the motion will be granted and the corrected brief will be considered because late filed and substituted briefs require "lenience." See *Daisy's Orginals, Inc.*, supra, and the other cases cited in the paragraph above. See also *Bricklayers Local 18 (Union County Bldg. Contractors)*, 159 NLRB 303, 304 fn. 3 (1996), remanded on other grounds 379 F.2d 926 (3d Cir. 1967), and thereafter enfd. 407 F.2d 1309 (3d Cir. 1969).

Based upon the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of counsel for the Acting General Counsel and Respondent, I make the following²

FINDINGS OF FACT

I. JURISDICTION

Based on the Respondent's answer to the complaint, as amended, and the Parties' stipulations at hearing, I find Respondent meets one of the Board's jurisdictional standards.

¹ The General Counsel, the Charging Party, and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

¹ All dates are in 1997 unless otherwise indicated.

² I specifically discredit any testimony inconsistent with my findings.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is a proprietary commercial packer which entails the packing of pears for grower accounts. Respondent receives the pears, weighs, sorts, cools, packages, and markets the pears. The Company then collects the funds, and, after deducting its charges, remits the remainder to the grower accounts. The business is seasonal. The start of the packing season depends upon the weather, which determines when the pears ripen. Respondent usually starts preparing for the harvest season in June; the season usually commences in July and ends in August. Prior to such preparation, Respondent has between 10–15 employees at the packing shed.

Alexander Ramsey Thomas III (Tom Thomas) is Respondent's president. Tom Thomas has an office at another location, referred to as the Gobbi Street office, and spends about 40 percent of his time overseeing the operation of the packing shed. Respondent also employee full-time office staff at Gobbi Street, including Julie Cooper as bookkeeper who supervises the payroll processing, and Joan Bell, the comptroller and office manager. Respondent's year-round crew at the packing shed includes Robert Rupe (Rupe), the packing house manager; the assistant packing house manager, Griselda Ruiz de Vega (Ruiz); Guadalupe Ballesteros (Ballesteros), foreman of a line and previously assistant sorting foreman; the senior mechanic; the head forklift mechanic; and, the head icehouse supervisor.

The remainder of Respondent's employees are called seasonal employees who tend, with the exception of forklift drivers, to roam from job to job, depending on business exigencies and the employees' talents. One of these seasonal employees is Monica Thomas, who is Tom Thomas' daughter. Monica Thomas is a full-time student who works principally during the harvest season. In 1997, Monica Thomas was the handwrapper crew foreman. Monica Thomas reported directly to Ruiz. Monica Thomas is bilingual, speaking Spanish fluently.

During the harvest season, Ruiz manages the day shift; about 8 to 10 foremen report to her. These include the sorting foreman, the receiving foreman, and the wrapping foreman. These foremen possess the authority to hire and fire, as well as run their respective crews. Additionally, there is the floor foreman, a custom packing foreman, a quality control supervisor, an icehouse foreman, and a day-shift personnel manager.

In preparation for the harvest season, Respondent employs forklift drivers, a carpenter, a woman handling quality control, and a clerical employee. The preharvest seasonal crew consist varies from year to year, depending upon the nature and extent of preparatory work Respondent must perform to be ready for the harvest season. For example, bin repair occurs once every 3 years. "A bin is a four foot-by-four foot square half ton carrying harvest container that the pears are received in." Respondent hires about 20 to 30 employees to do bin repair, painting, and general cleanup. As another part of the preparation for the harvest season, Cooper mails an invitation to work for Respondent to individuals on a list prepared by Rupe and Ruiz. The invitations are usually sent by June 1.

Once the harvest season commences, Respondent has a crew of about 200 to 300 employees for the first day that increases to

650 or 700 employees for the approximately 26-day harvest season. During this 26-day period, the employees work Monday through Saturday. Usually, the day shift works regular time from 7 a.m. to 4 p.m. with overtime until 5:30 or 6 p.m. Respondent also has a moonlight shift that starts work at 6:30 p.m. and finishes as late as 12:30 a.m. The night shift lasts about 3 weeks, and the full-day shift lasts about 4 weeks. About 30 percent of the fresh pears are handwrapped and placed in boxes.

In addition to grading, sorting, and packing the pears for the fresh market, Respondent places some of the pears in icehouses and refrigeration units. These stored pears are packed to order after Labor Day. The after-harvest season work is referred to as postseason or CMI season.³ In 1997, about 55 percent of Respondent's actual packing occurred postseason. Usually during the postseason, Respondent's employees work a 5-day 40-hour week; overtime is occasionally available on Fridays or Saturdays.

As the harvest season nears the number of seasonal employees diminishes. Many students are employed during the season and some of them start leaving to return to school prior to the end of the harvest season. Some of the employees follow the various harvests and leave to pack another crop. Respondent does not layoff 500 or 600 employees in 1 day, the last day of the harvest season. The night shift is the first to be laid off. Respondent has between 100 and 130 employees postseason. The postseason contingent also is reduced over time until, by January, Respondent has only between 10 and 15 employees.

Respondent determined to handle the change from harvest season to postseason differently in 1997. In 1997, they layed off everyone and rehired those employees who were to work the postseason. There is no claim this determination was reflective of animus or was unlawful. In the 1997 postseason, Ruiz was the foreman in charge of all the packing and assigned the postseason employees their jobs. The parties stipulated Respondent, as a matter of policy, does not contest unemployment insurance benefits claims unless the employee claimant was terminated for misconduct such as fighting or stealing.

One of Respondent's clients is Catalogue Marketing Incorporated (CMI), which also goes by other names not here relevant. Respondent packs a variety of gift packages for CMI. These gift packages are designed for the holidays so it commences packing for CMI about the middle of October until Thanksgiving, and ships these packages from Thanksgiving through mid-January, with the peak being the week before Christmas.

As here pertinent, the jobs assigned the packinghouse employees included: baggers, trayers, handwrappers, sorters, and gift packers. Some packing is performed by a machine. Gift packing is not performed during the harvest season, just during the postseason. Only a few sorters are employed postseason.

³ Tom Thomas used postseason to mean post-Labor Day, but this includes three discreet segments, the first when the pears are packed from the icehouses, which lasts until about October 15. The second is the CA season, when the pears are packed from the controlled atmosphere storage, which lasts until mid-November. The third postseason is the CMI season. The employees who testified generally referred to the entire postseason as the CMI season, which is the appellation used in this decision.

During the harvest season, the number of employees performing these stated duties varies, depending upon the nature of the orders for pears Respondent has received. For example, if there is a large order for pears packed in plastic bags that must be filled quickly, some of the employees performing fraying and handwrapping may be assigned to assist in the bagging. Some orders are for pears packed in trays and other orders are for pears in boxes where each pear is individually handwrapped. During the harvest season, the individual foremen decide which employees are assigned to the different tasks. Postseason, Ruiz is the individual who determines these assignments. Respondent attempts to develop a work force that can perform all the packing jobs, handwrapping, fraying, bagging, and sorting.

Each of these jobs require particular skills. For example, the bagger must pick good pears to put in the bag and of a size so the bag weighs the proper amount; it is a very precise job. Traying is placing the pears in trays with plastic cut outs the shape of pears. Traying does not take a lot of talent but does require coordination. Sorters hand grade every pear that comes into the facility, there are four grades of pears. Only about 40 percent of the pears are suitable for the fresh market and only 30 percent is suitable for hand wrapping. The remaining 60 percent of the pears go to various canning markets, including baby food. Badly damaged pears are discarded. In grading, the sorters look for blemishes.

Handwrapping is a very specific skill that only some employees have the talent to perform very well. Tom Thomas considers handwrapping to be a very difficult job requiring coordination to pick up the pear, pick up the packing tissue with the other hand simultaneously, and tightly and neatly wrap the pear. They must also sort out the bad pears. The pears are placed in the box in a pattern. Since the size of the pears varies, there are various numbers of pears that go into the box. Thus, if the handwrapper is packing 120-count pears, they must follow the appropriate pattern for that size pear so there are precisely 120 pears in the box. Respondent packs 10 different sizes of pears; therefore handwrappers must know the 10 different patterns. Gift packing postseason also involves some handwrapping, and 35 or more different gift baskets and fancy boxes are prepared during the postseason in addition to packing the refrigerated pears in the same manner as during the harvest sea-

Handwrappers are paid, regular time; \$00.47 per 44 pound box packed with a bonus of \$00.51 per box, and the overtime rate is \$00.705 per box with a bonus of \$00.765 per box. If the employee does not pack a sufficient number of boxes to earn the minimum wage, they are paid \$5 per hour regular time which was raised to \$5.15 on September 1, 1997, and \$7.50 per hour overtime. The sorters, baggers, trayers, and gift packers also receive bonuses which are awarded on a different basis than the bonus given handwrappers. Baggers and trayers were paid \$5 per hour plus a \$.10 bonus for each bag or tray packed. Sorters are paid \$5 per hour and receive a \$1-per-hour bonus.

Proficient handwrappers can earn as much as \$9.50 per hour and thus would be the highest paid line workers.

Whether a handwrapper receives the bonus is determined each day by the quality controller, who works under the foreman, in this case, Monica Thomas. The criteria used include: whether the employee was on time, did the employee place stickers on the boxes appropriately, whether the pears were packed in the correct pattern, were the pears neatly wrapped, and does the packed box weigh the correct amount. The quality control person pulls five boxes packed by each handwrapper at random to check quality. Respondent has a rule, regardless of how late, an employee cannot receive a bonus if they are late, even if they met all the other quality control criteria for the day. In 1997, Respondent started using a computerized timeclock where the employee swiped a card along a grove and the clock displays the time and signals if the clocking in process was acceptable. The clock rounds the time, so if an employee clocks in at 7:01 a.m., the time is rounded to 7:15 a.m.. Similarly, if an employee leaves at 5:01 p.m. their departure is recorded as 5:15 p.m. It was undisputed the timeclock was regarded as the official timekeeper for the packing plant.

B. The Employment of Rosa and Hilda Mireles

Rosa and Hilda Mireles are sisters. Rosa Mireles has worked for Respondent since 1986 as a seasonal employee. Hilda Mireles has worked for Respondent since 1991 and worked five postseasons. On August 19, Rosa and Hilda Mireles ceased employment with Respondent. Respondent claims they quit. Counsel for the Acting General Counsel and the Charging Party claim they were laid off at the end of the harvest season because Rosa Mireles complained about her box count, that the overtime rate was not appropriately initiated after 8 hours of work, and her failure to receive a bonus one day because Respondent claimed she was 1 minute late. They also argue Hilda Mireles urged Rosa Mireles to complain on August 12 about her pay, which was only 1 week before they were laid off. In the past, Rosa and Hilda Mireles were asked to stay for the postseason. They further assert Hilda Mireles spontaneously came to the aid of Rosa Mireles when Rosa Mireles was being criticized by Ruiz, which is protected concerted activity under Cub Branch Mining, Inc., 300 NLRB 57 (1990).

Respondent contends neither Rosa Mireles nor Hilda Mireles engaged in concerted protected activity and, assuming, arguendo, they did, they were not laid off or otherwise terminated because of such conduct. It is Respondent's claim Rosa and Hilda Mireles simply left Respondent's employ voluntarily at the end of the workday on August 19, which was a couple of days prior to the end of the harvest season. Respondent also claims had Rosa and Hilda Mireles resumed to work on August 20, Hilda Mireles would have definitely been offered postseason employment because she was a generalist. Respondent was less clear in its speculation of whether Rosa Mireles would have been offered postseason work because she was not a generalist. Ruiz, who determined who worked the postseason in 1997, claims to have offered all handwrappers, including Rosa and Hilda Mireles, postseason employment.

Tom Thomas determines when the harvest season is coming to an end and informs Rupe and Ruiz they need to start prepar-

⁴ Handwrappers also pack one-half boxes for which the are paid \$00.22 per box with a bonus of \$00.28 regular time and \$00.36 per box with a bonus of \$00.42 per box during overtime.

ing for the layoff of the night shift in a few days and the following week the day shift would be laid off. Rupe and Ruiz determine who is laid off and who remains working postseason. Tom Thomas did not consider Rosa Mireles a generalist, however she was considered one of Respondent's best handwrappers. Tom Thomas did not know Rosa Mireles' work history.

The first year Rosa Mireles worked for Respondent, 1986, she placed padding on the boxes to protect the pears from bruising. She did not work for Respondent in 1987 and 1994 because she gave birth to her children, and she did not work in 1988 for other reasons. In 1989, 1990, 1991, 1992, and 1993 she again placed pads in the boxes and did not work the post-season in any of these years. In 1995, in addition to putting the padding in the boxes she also sorted pears. As a sorter she earned more than when she was placing padding in the boxes and also received a bonus. Rosa Mireles was a sorter for 2 years. Ruiz was her foreman when she was a sorter. While a sorter, she occasionally worked as a bagger and at times cleaned the packing shed.

In 1995, Rosa Mireles was asked by Ruiz to stay for the postseason but declined the offer. In 1996, she started working as a sorter. Ruiz again asked her to work the postseason which she did. While working the postseason, she packed gift boxes and handwrapped pears. She was laid off November 24, 1996. In 1997, Rosa Mireles was again invited to work for Respondent and she started work in July, usually working 8 to 9 hours a day. She worked principally if not exclusively as a handwrapper.

The first year Hilda Mireles worked for Respondent was 1991. In 1991 and 1992, she was a sorter and worked both postseasons. In 1993, she worked as a sorter but could not recall if she also worked the postseason. In 1994, she again worked as a sorter and worked the postseason preparing the gifts packages. In 1995 and 1996, she started work early as part of the preseason cleaning crew, then as a sorter and stayed for the postseason making gift packs. She worked five postseasons. During the postseason she handwrapped pears for the gift boxes as well as for the large boxes, similar to the work she did during the 1997-harvest season. In 1997, Hilda Mireles again worked preseason cleaning the shed, then as a handwrapper. Every year Ruiz complimented her on her work; that she was a fast and good worker. Ruiz was her foreman sometime during each year she worked for Respondent except 1997, when Ruiz became assistant manager.

C. Rosa Mireles' Complaints Including a Complaint Lodged August 12

Counsel for the Acting General Counsel claims Rosa and Hilda Mireles concertedly complained to Respondent about an alleged discrepancy in Rosa Mireles' box count. Respondent denies Hilda Mireles ever complained about Rosa Mireles' box count or any other matter. It is Respondent's position that Rosa Mireles did not engage in protected concerted activity, and assuming she did, she and Hilda Mireles were not terminated because of such conduct, they quit. Rosa Mireles had several complaints in 1996 and 1997. I find the time and content of these complaints were unclear.

Rosa Mireles had a complaint in 1996 concerning the tally of her boxes. The date of the complaint is uncertain on the record but Rosa Mireles believes it was postseason, about September. According to Guadalupe Ballesteros, who was Ruiz' assistant in 1996⁵ and 1997, Rosa Mireles complained during the 1996 postseason that she was not given credit for more than 100 gift boxes she packed. Rosa Mireles was the only employee to complain about missing boxes. Ballesteros assured Rosa Mireles there were no boxes missing but Rosa Mireles persisted in her claim.

Rosa Mireles maintains she had to speak to Ruiz three times to get the matter resolved. The first time Ruiz said she was to busy, the second she said she would investigate, and the third time Ruiz was very angry. According to Rosa Mireles:

Every since I told her [Ruiz] that I felt bad about it, but I was sure that some boxes were missing, she turned around and saw me, absolutely mad, and screamed at me and said, "I'm sure that nothing is missing. I guess you have everything." That there's—that there aren't any boxes that are missing, that haven't been accounted for.

Rosa Mireles claims Ruiz later showed her the records reflecting her work, but Rosa Mireles claims she informed Ruiz they were the documents for the wrong week. According to Rosa Mireles, after informing Ruiz she had not been paid in accordance with the card Ruiz was referencing:

she said, "I know what's on the card, because I did it." And she didn't want to see, she was very mad, started to scream, "How much do you want to be paid." And that she didn't understand what I wanted. I said, "I only want to be paid what I worked." And she said, screamed, that I said that people—or they were robbing me, but there nobody robbed anybody.

I said, "That's not what I was saying that they were robbing me, but that there were mistakes."

Ruiz then sent Rosa Mireles to Ballesteros. Ballesteros investigated the complaint and found nothing missing from Rosa Mireles' box count. According to Ballesteros, she explained to Rosa Mireles "[T]here were no boxes missing and that I was going to pay for them anyway, that there were also some hours missing, but I didn't know how many of them. She had extra hours . . . how she had more hours than I had tallied there." Rosa Mireles had been paid for more hours than she had worked according to the tally sheet but Ballesteros determined to pay her for the claimed missing boxes anyway "so that not to create a problem I pay her for the ones that she was claiming." Ballesteros understood there is a company rule that "you have to be at peace with employees." Ballesteros did not know whether Rosa Mireles had spoken to Ruiz about her claim and she did not tell Ruiz she paid Rosa Mireles for the boxes. There is no evidence Ruiz or any other individual making decisions concerning Rosa and Hilda Mireles knew of Ballesteros decision to pay Rosa Mireles for an additional 100 boxes during the 1996 postseason.

A few days after this incident, Rosa Mireles was assigned to pack boxes as a handwrapper. Although Rosa Mireles indicated

⁵ Ruiz was the packing foreman in 1996.

she thought this may have been retributive, the evidence clearly indicates handwrappers have the opportunity to earn the most money if they are proficient and, after a few days Rosa Mireles became one of the most proficient. There is no evidence Rosa Mireles's income suffered from the reassignment or that such reassignment was other than routine. While counsel for the Acting General Counsel and the Charging Party had access to Rosa Mireles' pay records, they failed to support her claim she earned more as a sorter.

There is no persuasive evidence such assignment was punitive and no claim it was unlawful. Rosa Mireles received an invitation to return to work for Respondent for the 1997 season after the 1996 complaints. Ruiz' claimed ire did not result in any retributive action. There is no evidence this complaint gave rise to Respondent taking any proscribed action against Rosa and/or Hilda Mireles. There was no evidence such assignments were not coveted. Ruiz did have input as to who was to be invited to work for Respondent in 1997, and Rosa and Hilda Mireles both received and accepted such invitations. Thus, there is no basis to consider the 1996 complaint or Ruiz' alleged reaction to the complaint as the basis for any animus by Respondent against Rosa and Hilda Mireles. Supporting this conclusion is Hilda Mireles' admission Ruiz frequently gave her short assignments performing different jobs, as business requirements mandated.

Monica Thomas recalls Rosa Mireles had several complaints during the 1997-harvest season. One complaint was the new packers were slowing her down which adversely affected her income. It is not uncommon, particularly at the start of the harvest season for employees to complain about the individual working next to them, and Respondent moves the employees around to form the best teams. Other handwrappers also had complaints. There is no evidence of disparate treatment or proscribed actions as a result of this complaint.

Also at the beginning of the 1997-harvest season, Rosa Mireles complained the tally person failed to start marking the overtime boxes after 8 hours, she started marking them one-half hour late. Monica Thomas candidly admitted Hilda Mireles and others also complained about the matter. According to Monica Thomas, the tally person was not told the proper routine and Monica Thomas took full responsibility for the error. To correct the problem, after the shift, Monica Thomas determined how many boxes each affected handwrapper averaged per hour, and added that number of boxes as bonus boxes. The correction was made the same day and all the employees were paid for the bonus boxes on time. Monica Thomas informed the employees of the measures she employed to correct the problem the following morning. There is no evidence Tom Thomas, Ruiz, or Rupe knew of this incident. There is no evidence this complaint was one of the reasons Rosa Mireles or Hilda Mireles ceased working for Respondent.

The first day of the 1997-harvest season, Rosa Mireles and others worked on a special order which took more time to complete because stickers were placed on each pear they packed. At the end of the assignment, Rosa Mireles asked the tally person how they would be paid their bonus. She was told the work would be paid by the hour, no bonus would be paid per box packed. At the end of the week, Rosa Mireles complained that

she was not paid the appropriate bonus for other boxes she packed the following Saturday. She claimed all the boxes packed that Saturday should have been recorded as overtime boxes with the appropriate larger bonus but only half the boxes were subject to the larger bonus. Rosa Mireles raised the matter with Monica Thomas who referred her to Ruiz. Rosa and Hilda Mireles went together to talk to Ruiz. Rosa and Hilda Mireles were not paid the overtime bonus for the 50 percent of the boxes that was the subject of their complaint. There was no showing they were improperly compensated or their complaint was casually related to their cessation of employment with Respondent.

Rosa Mireles never complained to Monica Thomas about any other unpaid overtime or unpaid hours. In fact no other employee ever complained to her about pay issues. According to Rosa Mireles, she mentioned this overtime start time problem to Ruiz who reacted in anger and told her to ask Monica Thomas. Her sister Hilda Mireles was nearby as well as other employees. I find Monica Thomas' testimony concerning the overtime bonus to be the most credible. Monica Thomas testified in an open and convincing manner, her mein was straightforward without any indication of device. As indicated herein, Rosa Mireles appeared less forthright and seemed to engage in hyperbole.

On or about August 12,⁶ Rosa Mireles did not receive her bonus per box packed.⁷ According to Monica Thomas:

A. She came up to me at the end of the shift and said, "Monica, I didn't get [sic] bonus." And I said, "Rosa, okay, let's look at this." Rosa's a very fast packer, she's a good packer, that's something that we'll look into, so we-I grabbed the bonus sheets out of the-out of the desk, looked through them, looked at her number, and everything was fine, except that she had been late that morning. I said, "Rosa, you were late this morning." She said, "Oh, no, I wasn't." I said, "It says right here you were late, let's go check." Went into the office and had a print out, a computer print out of the electronic time clock, which shows all my packer numbers. It wasn't the whole thing, just this section of packer numbers. Her number came out and it said her number, Rosa Mireles, she had punched in at 7:15. Now, the clock forwards the 15 minutes, just even if you're late one minute. She said, "I wasn't here at 7—I was only one minute late." And I said, "Rosa, I'm sorry, if

⁶ According to Rosa Mireles, she inquired of the tally person why she did not receive her bonus on August 4 and was told she was late. It was not until August 12 that she spoke to Ruiz because she noted the clock on the wall was not the same as the timeclock. The timecard indicates Rosa Mireles was late on August 6 and was not paid a bonus on this date because of her tardiness.

⁷ The bonus was referred to as a quality bonus and, as previously discussed, was awarded based on several factors which were part of a point system. If the employee did not earn enough points, they were not awarded the bonus. One factor is whether the employee placed their personal identification stickers neatly and properly on the boxes they packed. Another factor is whether the pears are packed in the proper pattern. The third factor is whether the pears are neatly wrapped. The fourth factor is whether the box weighs the correct amount, and the last factor is whether the employee was on time that day.

you're late, you're late, and you don't get bonus. You know that, that's the rule." And she said, "All right." And that was the end of it.

Q. And she left?

A. Yes.

Monica Thomas admitted Rosa Mireles claimed the timeclock must be incorrect and Monica Thomas said, "It can't be off." Rosa Mireles did not refute Monica Thomas's testimony. No one was with Rosa Mireles when she spoke to Monica Thomas. Rosa Mireles then asked Ruiz if she lost the bonus if she clocked in 1-minute late. Ruiz recalls Hilda Mireles was not present. Ruiz asked Monica Thomas why Rosa Mireles did not receive her bonus and Monica Thomas showed Ruiz Rosa Mireles' timecard and bonus papers. Ruiz showed Rosa Mireles these documents and explained that it was company policy to not pay the bonus if the hand wrapper was late, that she knew the policy and should come early to avoid future losses of the bonus.⁸ Rosa Mireles did not reply to these comments. According to Ruiz, Rosa Mireles did not claim the clock was slow during this or any other conversation with her. It is unchallenged the employees know they were not on time the moment they punch in because the clock reads out the punch-in time.

Ruiz also claims Rosa Mireles did not raise any issue involving overtime. Rosa Mireles claims after initially speaking with Ruiz, she went to the tally person and checked the number of regular and overtime boxes she had packed. She disputed the number recorded, claiming she counted 30 or 32 boxes rather than the 18 boxes marked on the tally sheet. This was evidently the time early in the season when the tally person failed to start overtime at the appropriate time and Monica Thomas rectified the error by adding an hour's worth of boxes to the handwrappers overtime even though they only lost one-half hour of overtime. I find Rosa Mireles was confused and confused about the complaints she made.

Rosa Mireles then spoke to Rupe. Rupe does not recall if anyone was with her but was sure Hilda Mireles was not with her. She said she did not think it was fair being docked her bonus for the day being a "second late." Rupe asked if she had talked to Ruiz and she said yes. Rupe informed her: "It is company policy if you are late that you lose the bonus for the day If that's what she's told you, then I have to stand behind company policy." Rosa Mireles shrugged, said, "It's not fair," and walked away. Rosa Mireles did not mention any bonus relating to any other employee, did not mention overtime and did not claim the clock was in error. This was the only pay complaint Rosa Mireles made to Rupe. Hilda Mireles has never complained to Rupe about her wages. Rupe testified Rosa

Mireles speaks some English and spoke to him without an interpreter.

Rupe spoke to Ruiz about Rosa Mireles' bonus and Ruiz indicated she checked the timecard and the denial of bonus was appropriate. Both Rupe and Ruiz independently asked Monica Thomas what had occurred after Rosa Mireles spoke with them. Monica Thomas informed them Rosa Mireles had been late thus she did not receive her quality bonus for the day. They both indicated, "Okay" to Monica Thomas.

Rosa Mireles stated Ruiz confronted her and Hilda immediately after she spoke with Rupe, as folows:

She [Ruiz] arrived mad and was screaming at me, screaming at me why did I talk to Bob? That I was overpassing the supervisor, that I shouldn't have talked to Bob.

- Q. And what, if anything, did you say?
- A. I told her it's because I haven't seen Monica.
- Q. And what, if anything, did she say after that?
- A. She was very mad and screamed at me that I was accusing them of stealing me.
 - Q. And what did you say?
- A. I wasn't accusing her of robbing me. That they could make mistakes. And she screamed that no, that I was saying that they were robbing me, or they were stealing me, and I was always complaining, and that if I didn't like. that I should leave from packing.

Rosa Mireles claimed her sister Hilda participated in this conversation. According to Rosa Mireles, after Ruiz' comments, she said:

... yes, that I like my job, that I wanted them to pay me, that's why I worked hard, and she screamed at me how much would you like you to be paid? I told her only that what—that which I worked. At that moment my sister said not what she says, but what she does, because with the stickers we were given, it was very easy to check and to count, to count the boxes.

And also, when Griselda told me that I was the only one that complained, my sister said no, there were other people that were complaining. And she said who? Who are complaining? My sister didn't want to give names, and she said tomorrow you'll pay for it.

Hilda Mireles did not initially recall specific events on August 12. After some refreshing of her memory, she recalled sitting on a bench outside Rupe's office after her sister asked her "that morning . . . if it would be okay to ask Bob about the boxes of overtime." According to Rosa and Hilda Mireles, Rosa Mireles got someone to act as an interpreter in her conversation with Rupe. Neither Rosa or Hilda Mireles could recall the full name of the interpreter although Rosa Mireles could recall her first name. Rupe could not recall if there was anyone other than Rosa Mireles present during the conversation. According to Hilda Mireles, Rosa Mireles asked Rupe two questions, one concerning if an employee could lose the bonus for being 1 minute late and the other about overtime. Hilda Mireles admitted she did not pay attention to the Rupe-Rosa Mireles conversation and she does not understand English "very well." This admission indicates the conversation was not transmitted by an

⁸ Rosa Mireles generally corroborated Ruiz as follows:

Because I told her when I came I was driving to work in my car, and I was arriving on time. I think that I had extra time. But I—when I would go to punch, I saw that the punch changed to 7:01, and she told me if I worried that much about losing my bonuses, that if I arrived one minute late, then I would arrive a minute earlier. And that I wouldn't come with the time the radio said, but that I would come with the time that the punch-in clock said.

Rosa Mireles claimed she told Ruiz the timeclock was running fast.

interpreter, contrary to the testimony of Rosa and Hilda Mireles.

Hilda Mireles remembered after Rosa Mireles finished talking with Rupe, Ruiz came by and screamed at Rosa Mireles. According to Hilda Mireles:

A. The first thing that she [Ruiz] said to her, "Rosa, do you know what you're doing? Why did you ask Bob? Do you know what you're doing? You're going over your person who's in charge of you."

Q. And did Rosa respond, if you can recall?

A. No, she—because if you don't like this job, leave the—leave the area of packing

A. Rosa said to Griselda that she liked her job. Griselda answered to my sister, "It doesn't seem so. You are—you are who is always complaining. You are the person who is always complaining...."

A. When Griselda said to my sister that she was the person who was always complaining, I told her, to Griselda, she was not the only person, that there were other people who were also complaining, but they weren't saying anything because they were afraid. Griselda asked me scared of what? I answered of losing their job.

A. She, Griselda, told my sister that—that they—that they ordered boxes that she would like. Griselda told my sister take—let them pay you all the boxes that you say

A. She [Ruiz] was using a very strong tone of voice. She was very—she looked very mad.

According to Hilda Mireles, she saw Ruiz several times during the ensuing week and "notice[d] that she was mad because when we saw each other, she looked very serious" and looked away from Hilda Mireles. Prior to August 12, according to Hilda Mireles, Ruiz would smile when they met.

Ruiz testified she asked Rosa Mireles if she had discussed the matter with Monica Thomas because Monica Thomas was her foreman and had the paperwork including Rosa Mireles' timecard and bonus papers. Ruiz claimed she obtained the paperwork from Monica Thomas and showed it to Rosa Mireles explaining why she did receive a bonus that day. When she was packing foreman, Ruiz would frequently receive complaints from employees about their pay and she routinely went to the office and got the paperwork to determine if there were any mistakes. There were mistakes on occasion. When Ruiz was a foreman she went to the office frequently with Rosa Mireles concerning her complaints. Ruiz did not specifically deny Rosa Mireles' account of the encounter after Rosa Mireles spoke to Rupe.

Ballesteros testified Rosa Mireles also complained to her, "that Monica hasn't paid her bonus because she arrived late, and that she was paying the bonuses to her friends." Rosa Mireles wanted Ballesteros to tell Monica Thomas to pay her the bonus. Ballesteros informed Rosa Mireles that was not her

"obligations, that I didn't know what was going on." Ballesteros never mentioned the bonus to Monica Thomas. Rosa Mireles was not called to refute Ballesteros' testimony.

Rosa Mireles recalled she was marked late twice in 1997. The details of this second late arrival were never presented on the record. There was no showing Rosa Mireles was treated disparately either time she was recorded as having arrived late for work and there is no allegation the failure to award her bonus when she was late was discriminatory or otherwise improper. While Rosa Mireles claims the timeclock was wrong, she could not recall if there were other employees clocking in at the same time that day. There was no evidence adduced that any other employee claimed the clock was in error or clocked in late that day.

D. August 19

Rosa and Hilda Mireles ceased working for Respondent on August 19. The parties' explanations differ greatly. According to Rosa Mireles, Monica Thomas came up to her near the end of the workday on August 19 and: "[T]told me the season was over, that if they wanted to work for CMI [postseason] that they had to talk to Griselda [Ruiz]." Monica Thomas testified without contradiction that she followed this procedure with all the employees she supervised. Rosa Mireles did not know when the harvest season was over but understood that to be the last day. Hilda Mireles claims she had not been told by Monica Thomas that if she wanted to work the postseason she was to talk with Ruiz. She was going to Ruiz's desk to determine how many boxes she had packed that day and encountered her sister.

Hilda Mireles could not recall what her sister said at that time. She admitted to poor recall of the events at the time she testified and there was some variance between her testimony and one or more of her written statements. In one of her statements she indicated Rosa Mireles told her that she had been fired prior to their talking with Ruiz. Her testimony contradicted this statement. She did not recall anyone telling her she had been laid off prior to speaking with Ruiz. I find, based on her demeanor which did not appear candid and open, that Hilda Mireles was not a credible witness, and her testimony will be credited only when it is an admission against interest or has been credibly corroborated. On more than one occasion, she did not appear to be trying to develop an accurate record. Supporting this finding was the fact that some of her testimony was shifting, inconsistent and, she was unsure of some facts.

In the past, Ruiz would individually ask selected employees if they wanted to work the postseason.¹⁰ After Rosa Mireles punched out for the day, she and her sister Hilda went to talk with Ruiz. The change in method of announcing the end of the

⁹ The disparity between the testimony of Rosa Mireles and Hilda Mireles indicates, at best, Hilda Mireles may be referring to Rosa Mireles' 1996 complaint or the complaint she lodged the first week of the 1997-harvest season.

¹⁰ Sister of Rosa and Hilda Mireles, Georgina Mireles, also worked for Respondent in 1997. Georgina Mireles was a floor lady, which was a supervisory position. She testified Ruiz asked her to work the post-season in 1997. Inasmuch as Georgina was a supervisor, the difference in the manner of asking the employee to remain postseason compared to her sisters being instructed by Monica Thomas to ask Ruiz, is not probative of disparate treatment or indicative of proscribed motive. There is no evidence any handwrappers were individually asked to remain for the postseason by Ruiz rather than being instructed by Monica Thomas to ask Ruiz.

harvest season and inviting workers to work postseason in 1997, the first year Ruiz was assistant plant manager, appears to have been applied to all the handwrappers. When they found Ruiz, she was talking to a group of employees, telling them they were to continue working for Respondent in the postseason. On cross-examination, Rosa Mireles admitted she did not hear all of Ruiz' comments to these employees. When that group of employees left, Rosa and Hilda Mireles stayed as did a first-year employee named Alva. Alva asked Ruiz if she could stay and was told yes.

Rosa Mireles testified, next:

Griselda fumed around, looked at them, and told them that's all, girls. The season is over, I'll see you next year.

- Q. And did anyone else speak after that?
- A. I spoke.
- Q. What did you say?
- A. I told her what about us? Monica told us—asked us to ask you if we're coming tomorrow.
 - Q. And what did Griselda say?
- A. She said, "Tomorrow, no. Today was your last day, the season is over."

Hilda Mireles recalled as they approached Ruiz and a group of about 12 employees, she heard Ruiz say: "Yes, we're going to continue, we're going to work tomorrow. I'm not sure if we're going to pack, but tomorrow at 7:00." In response to a question she heard Ruiz say: "Yes, she told her that tomorrow at 7:00 and not to leave, I needed her to work at that time, at that moment to go outside to see what she could do, or what they would tell her to do." Rosa and Hilda Mireles claim employees who had less experience at Respondent including individuals that had worked only that season and were not as adept at handwrapping as they, were instructed to report to work the next day.

Monica Thomas testified, on August 19:

I went around to every packer, as I generally do towards the end of the day to tell them what we're expecting the next day, what time we're quitting that day, tell them we're stopping work that day. And I went around and said we're going to be slowing down this week, if you are thinking of working post-season, you need to speak with Griselda, we're going to be filling out applications for this year post-season working, you need to speak to her, and that was it.

She denies telling anyone on her crew the harvest season for handwrappers was ending that day, rather, she asserts she informed them the end was soon. She testified: "When the lay off goes into effect, I say, 'Today is our last day, thank you very much for working, I'll see you next season, hopefully." Ruiz

told her to inform the employees the end of the harvest season was approaching.

Hilda Mireles next claimed an employee named Gabriella asked if she was to work the following day and Ruiz said no. Hilda Mireles understood this was Gabriella's first season and she had worked as a handwrapper. Rosa Mireles then asked if she and Hilda Mireles were to work the next day, and according to Hilda Mireles: "Griselda made a brusque gesture with her hands. 'No. that's all, the season is over.""

Rosa and Hilda Mireles then left and did not return to work. Rosa Mireles was sure Ruiz was addressing her and her sister because of her use of the Spanish term "su" which is the formal term for you or the plural form of you. According the interpreter:

"Su refers to your formal. It might also refer your last day 'Tu' is an informal way of referring to people. Su is a formal way of referring to people. Tu is a friendly way of referring to people. Su can be a formal or a distance." According to Rosa Mireles, Ruiz never addressed her in the past using the formal term "su."

E. Hilda Mireles' Returns to the Plant

Hilda Mireles resumed to Respondent's packing plant three times after August 19. The first time was to repay \$350 Rupe arranged for her in 1996, as a loan from Respondent to pay for repairs to her car. She was accompanied by her nephew, Francisco Mireles, Rosa Mireles' son, who was about 9 years old at the time. Francisco Mireles was Hilda Mireles' interpreter. This visit occurred around August 22. She gave Rupe the cash and he had a receipt prepared for her. Hilda Mireles asserts she asked her nephew "to tell him that it was unjust that Griselda would have told me to leave. If he remembered the day that my sister had talked to him." She claims Rupe recalled the incident and she asked her nephew to tell him she "was thinking that Griselda had told me to leave or to go away because of that, or because I had participated in that conversation." Her nephew informed her Rupe replied, "[T]hat Griselda was-would decided who would leave and who would stay." Rupe asked if she had a job and she replied no.

According to Francisco Mireles:

- A. My aunt told—my aunt told me to tell Bob that when my mom went to tell Griselda that they weren't paying her the money they had to pay her, my mom told her, and then Griselda said why was she the only one. Then my aunt, my Aunt Hilda, came in and said that she wasn't the only one, that other people were just scared to complain.
 - Q. So did you tell Bob all that?
 - A. Yes.
- Q. And what was the next thing that was said after that?
- A. Bob said he didn't know—he didn't know why they laid off my Aunt Hilda if the problem was with my mom.
- Q. And did your aunt say—did you translate that for your aunt? That part?
 - A. Yes.
 - Q. Did she say anything in response to that part?
 - A. No.

¹¹ Rosa Mireles thought Alva was a very slow handwrapper. I note that according to GC Exh. 16, there was no handwrapper named Alva, but there was an Alba Naldez who handwrapped 2 days, packing six boxes less than Rosa Mireles the 1 day they worked together. On GC Exh. 19, there is an Alva Acosta listed whose work record demonstrated she was at least an average handwrapper if not above average. This is another indication Rosa and Hilda Mireles engaged in hyperbole when they described Alva as being an inexperienced slow worker.

Q. And what was the next thing that was said?

A. Bob—Bob said anyways he cannot do anything about it because Griselda was the one who decided who gets—who goes and who doesn't.

Francisco Mireles also asserted Rupe did not request that he ask his aunt why she quit, offer her a job or mention her working for Respondent in the future. According to Rupe, he noted that was a lot of cash and inquired if Hilda Mireles would prefer to make payments. She replied no. He then asked, "[I]f she would go out and talk to Griselda about why she and Rosa Mireles quit." Rupe did not want Hilda Mireles to discuss her quitting using the young boy and she could discuss the matter fully with Ruiz in Spanish, without an interpreter "because they were no-shows, they were quits." Rupe testified he asked Hilda Mireles why she was not working and in reply: "She would just shrug and not say a word." Rupe encouraged her to speak to Ruiz about why she quit. He never asked her if she wanted to work the postseason.

Bell testified she was present when Hilda Mireles returned the money to Rupe and overheard the conversation. According to Bell:

Hilda laid down some cash on Mr. Rupe's desk, and the young boy—she didn't ever really look at Mr. Rupe. She just kept telling the boy what to say to him, and the little boy said, "Hilda wants to pay this money back," and Mr. Rupe, he said a couple times to her, "Hilda, you don't have to pay this back right now." He said, "Winter is going to come up. Money is going to get tight, and I don't want things to get"—you know, "you to be hurting. You don't have to pay this right now." He said that a couple times, and she just would shake her head no, and she kept pushing the money towards him. The little boy said, "No, she wants to pay this"

[Rupe] asked her why she wasn't, you know, working, and she didn't say—she just would look at the little boy and not really say anything. He asked her a couple times. "If there's a problem, go talk to Griselda," and again she would just sort of shake her head and that was about it.¹²

Bell denies Hilda Mireles, through her nephew, mentioned anything about Ruiz telling her not to come to work or, that she was terminated because Rosa Mireles had complained to Ruiz or others about her bonus or pay. Because of the unusual circumstances of the loan, Bell was paying attention to the conversation. Bell balances Rupe's business checkbook and inquired about the \$350 item when she first noticed it in 1996 bout 1 week later Hilda Mireles resumed to the facility to return some money from a savings pool run by Ruiz and Ballesteros. Hilda Mireles asked to speak with Ballesteros and while waiting saw Ruiz who passed by her as if she had never seen her

before. Ballesteros, when she saw Hilda Mireles, asked why she was not working and Hilda Mireles merely shrugged. According to the interpreter, "[W]e use this expression very often in Spanish, in our countries, when you say, 'Well, I don't have an answer for that. So what?'" Ballesteros then suggested Hilda Mireles speak with Ruiz and Hilda Mireles responded again with a shrug. Three days later, Hilda Mireles again went to the plant to deliver Avon products and observed employees bagging pears.

F. Respondent's Reasons for its Actions

In addition to claiming Rosa and Hilda Mireles quit, Respondent gave various reasons for Rosa Mireles' layoff. In a letter to Rosa and Hilda Mireles' attorney, Rush, signed by Tom Thomas, Respondent claims Rosa Mireles was not terminated, she was laid off in accordance with the normal seasonal procedures, with one exception. The letter, dated February 5,1998, provided:

The 1997 exception concerned a change in the skills of the employees we asked to remain for the fall season. In prior years, we had tried to keep as part of the fall crew people who were packer specialists, such as Rosa Mireles. In 1997, because of major changes in our operating and marketing procedures in response to customer demands, we needed to offer fall employment to folks who were "generalists," that is, employees who had the training and/or experience to handle a number of different jobs in the packing shed.

Rosa Mireles did not fit this description. She had worked almost exclusively as a packer, and had very little experience in other jobs. Accordingly, Ms. Mireles was one of six hundred employees who were not offered seasonal fall employment.

The letter also claims Hilda Mireles met its "generalist" needs, and the same day Rosa Mireles was laid off it asked Hilda Mireles to stay for the postseason. However, the letter continues, Hilda Mireles left that afternoon and never resumed to work. Respondent considered her a voluntary quit because she never contacted her supervisor and did not explain her absence. The letter discussed several of Rosa Mireles' complaints and related Respondent's policy, given to employees during daily training sessions, that employees are to ask their supervisors/foremen anything they wished and, if the reply is not satisfactory, to go to the next level of management. "The notion that any of our employees would be fired 'because they complained' is absolutely contradictory to our open communication policy."

On February 20, 1998, Respondent wrote a Region 20 representative in response to the charge. In this letter, Respondent denied Rosa and Hilda Mireles engaged in concerted protected activity or were fired because of such alleged conduct. Respondent explained the seasonality of its operations, resulting in the layoff of about 600 employees at the end of the harvest season, retaining about 100 employees to work the postseason. The change in retention policy for the 1997 season was explained in the letter as well as its open door policy. Respondent reiterated any claim Rosa Mireles was fired because she complained con-

¹² On cross-examination, Bell testified:

[[]Rupe] just asked [Hilda Mireles] two things that I remember. He asked her first, like, well, why aren't you working. He asked that a couple times. She didn't respond at all, just sort of shook her head at the little boy. And then he asked her to go talk to Griselda. If there's some problem, go talk to her. He said that a couple times, and that was if

tradicts the long standing "open communication policy." This letter also maintains Rosa Mireles worked principally as a packer. "Rosa has very little experience in other packing shed jobs." Respondent failed to introduce any probative evidence refuting Rosa Mireles' testimony she performed many jobs in past years and it was only during the 1997-harvest season she worked principally as a handwrapper. Respondent admitted Hilda Mireles had frequently held positions other than handwrapper, including sorter, bagger, trayer, and quality controls. Tom Thomas admitted most if not all of his information concerning Rosa and Hilda Mireles came from conversations with Rupe, not Ruiz. Rupe admitted he was not knowledgeable about Rosa Mireles' work.

Respondent acknowledges Rosa Mireles complained that she did not receive her bonus on or about August 12. She never complained about any other employees compensation or other issues relating to their terms and conditions of employment. After investigation, no supervisor could recall any complaint by Hilda Mireles. Respondent contends in the letter it did not, and did not intend to ask Rosa Mireles to work postseason because she was not a generalist. The letter further avers Monica Thomas informed Rosa and Hilda Mireles on August 19, that August 20 would be the last day of the harvest season and if they wished to work the postseason they should speak to Ruiz. The letter claims Ruiz saw Rosa and Hilda Mireles with other employees at the end of the workday on August 19, but neither Rosa nor Hilda Mireles spoke to Ruiz. "They did not report bact to work on the 20th, and never inquired at any time about working on the fall crew." 14 Respondent also declares all employees were informed on August 19 to report for work on August 20.

Respondent explained Rosa and Hilda Mireles were not invited to work the 1998-harvest season because they were considered voluntary quits at the end of 1997. It is company policy not to send invitations to work to individuals who voluntarily quit. This claimed policy is unrefuted. Thus, in these circumstances if it is determined Rosa and Hilda Mireles voluntarily quit, the failure to invite them to work the 1998 season would not be a violation of the Act.

On April 28, 1998, Respondent again wrote the Region asserting that all employees who were interested in working during the postseason were to contact Ruiz. "No employee was told not to apply for the fall crew." All employees were told to report to work on August 20, and Rosa and Hilda Mireles did not report to work that day without notice or reasons. Rosa and Hilda Mireles did not speak to Ruiz. Respondent also claims the week of August 25–31 was the first week of the postseason.

Monica Thomas did not determine who would be asked to remain for the 1997 postseason. She did testify whenever Rosa Mireles complained to her she was alone. Near the end of her work year, Monica Thomas wrote a memorandum concerning Rosa Mireles as follows:

As supervisor of the day packing crew, I worked closely with Rosa Mireles and am [sic] familiar with her work performance. As a packer, Rosa was quite fast and her boxes relatively neat. Her attitude, however, did not follow suite. A constant complainer, it was difficult for me to face such negativity from her every day.

Sometimes her complaints were about the flow of pears, whether it be to light or to heavy, depending on what she preferred. Other times she attacked the management, claiming that a certain line-up was unfair or a bonus check unjust. One particular complaint came after the shift one afternoon when Rosa inquired why she had not received a bonus on a previous day that week. I referred back to the bonus sheet for that particular day and found that she had been late that morning and not received the bonus. A computer printout from the E.T.C. (Electronic Time Clock) revealed the same, with a record of the time she had punched in that day rounded to the nearest quarter hour. Upon seeing this she protested that the clock was off that day. I responded saying that if that had been the case she should have spoken to me that morning, as there would probably have been an abnormal amount of people punching in late. The next time I heard of a similar complaint was when she approached my two superiors, Bob Rupe and Griselda Ruiz. I was never directly approached about the subject again.

Monica Thomas admitted she was asked to prepare this document but could not recall who made the request. The solicitation was to "describe what happened" when Rosa Mireles had inquired about not receiving her bonus. On direct examination, Monica Thomas testified she could not say Rosa Mireles complained everyday but she was negative toward her. This was the only memorandum Monica Thomas has written about an employee. Monica Thomas did not have any role in deciding who would be retained for the postseason; Ruiz and Rupe did not consult her

Rupe, in his planning documents for the postseason, included Hilda Mireles as a postseason employee. Rupe determined not to include Rosa Mireles in the projections. Rupe explained "I've had a lot more closer relationship working with Hilda than I have with Rosa. I prefer to work with her." According to Rupe, he knows of no formal recommendation that Rosa Mireles not work the postseason. In contradictory evidence, on or about September 5, when Rupe was contacted by Rosa and Hilda Mireles' attorney, he said Rosa Mireles was laid off in a general layoff. Rupe believed the date of the general layoff was August 19. Later, on redirect, Rupe testified he could not recall the date the harvest season ended but believed the first day of the postseason was August 26.

Rupe admitted Ruiz made the decision as to who worked the postseason in 1997. Rupe decided who received the invitation to work for Respondent for the 1998-harvest season. Rosa and

¹³ Hilda Mireles never claimed she performed any quality control work for Respondent.

¹⁴ Georgina Mireles testified she was not asked to work August 20 after she declined the invitation to work the postseason. Georgina Mireles admitted she assumed August 19 was her last day because usually she is asked to stay the postseason the last day of the harvest season. I find this assumption is not a probative refutation of Respondent's claim the harvest season did not end on August 19, although some students stopped working that day to prepare for their return to school. Respondent was reducing its employee complement that entire week.

Hilda Mireles did not get invitations, according to Rupe because:

The policy is if a person quits, they're a quit. If that person quit and then comes back to me, or not necessarily to me but comes back or uses another person such as Griselda, and then comes to me and says that I had to quit because I had nobody to take care of my kids or whatever, then I'll reconsider and hire them.

Ruiz testified at great odds with Rosa and Hilda Mireles. She claims she directed Monica Thomas to inform all the packers working on August 19, to see her at the end of the workday because she wanted to determine who would be willing to stay and work the postseason. More than 20 handwrappers were present. According to Ruiz:

Some of them asked who was going to stay, and I said whoever wants to stay because I need all the wrappers that can stay and work. . . . I said that I didn't want anybody that they were going to have to leave because they go to grapes, pick grapes. It's almost right after the season of pears. A lot of them go to Mexico and vacation. I told them be sincere with me. If they were going to stay, to let me know, and if they weren't, to let me know too. And some of them they said that they couldn't because they didn't have a baby sitter. Others said that they were going to go to college. Another one said that she was going to Los Angeles. And then the others said that they could stay, so I just said okay. I'll see you tomorrow

I thanked them \dots I said to them that I thank them very much for helping us out in the season, that I hope I can see them next year is what I say.

Ruiz denies telling any employee that afternoon not to come to work the next day. She did not see Rosa and Hilda Mireles with the group of handwrappers she was addressing. In previous years, when Ruiz was the sorter foreman, she individually asked the sorters if they wanted to work the postseason. When she became assistant manager in 1997, she instructed the foremen to have the employees come to her so she could ask if they wanted to work the postseason. Rupe informs her when the harvest season is ending and gives her a list of employees which has empty spaces to add employees. According to Ruiz: "And then we put them on whoever wants to stay and pack because we need all the wrappers." The reason for needing wrappers is: "Because everything that's been put away it's for wrapping, to make—to wrap them in boxes." Ruiz had not discussed with Rupe whether Rosa Mireles should have been on the list. If Rosa Mireles had asked to work the postseason she would have retained her. Ruiz recalled the harvest season ending at the end of the week, and August 19 was a Tuesday.

As an indication of Ruiz' lack of animus toward Rosa Mireles, while they were in class together at the local college, Ruiz helped Rosa Mireles understand directions from the instructor, which led to the instructor chastising Ruiz. This incident was unrefuted.

Ballesteros was present at the August 19 employee meeting. ¹⁵ Her testimony is corroborative of Ruiz'. According to Ballesteros:

Griselda said, "I'm going to use all of you because you know how to do the work, the job. But I want to know which one of you are going to stay all the way through because I don't want anyone to abandon the job halfway through. I need you all."

Several employees said they could not stay. Ruiz thanked them and indicated she expected to see them the next harvest season. Ballesteros saw Rosa and Hilda Mireles standing about 6 feet apart from the main group of packers. She did not recall if they were present at the beginning of the meeting, but did notice them when Ruiz was finishing her talk. Ballesteros did not hear them say anything to Ruiz and asserts Ruiz did not say anything directly to Rosa and Hilda Mireles. She testified Ruiz did not tell any of the handwrappers the season was over or, that any handwrapper should not come to work the next day. After all the employees left, including Rosa and Hilda Mireles, Ballesteros remained to talk with Ruiz.

It has been Ruiz' experience when she was a foreman that employees frequently have questions about their pay and "[a]s a foreman, I used to go to the office and find out what happened and get their records and see—and help them out and see what was wrong with them." She readily admitted on occasion Respondent's office made errors in employees' pay. She further testified:

Q. When you were a sorter foreman, did you ever go to the office with Rosa about her pay complaints?

A. All the time.

As previously indicated, it has also been Ruiz' experience that at the end of the pear harvest season some of the employees leave immediately to pick grapes and many of Respondent's employees vacation in Mexico. Thus she was concerned the employees who said they would remain working for Respondent were sincere because they were needed.

III. ANALYSIS AND CONCLUSIONS

Counsel for the Acting General Counsel and the Charging Party argue Rosa and Hilda Mireles were engaged in concerted protected activity when Hilda Mireles joined in the complaint of Rosa Mireles and they were laid off because of the complaint. They also aver the actions of Rosa and Hilda Mireles after August 19, indicate they did not voluntarily quit. Respondent avers Hilda Mireles had no complaint, Rosa and Hilda Mireles were not acting in concert, and they were not laid off because of any complaint.

¹⁵ Ballesteros was uncertain if the day of this meeting was August 18 or 19, testifying it occurred on August 18. Her confusion may have arisen based on comments preceding this testimony. I find this confusion or lack of precise recall of the date does not reach the level of calumny or otherwise require her testimony not be credited. In considering her testimony, I observed she attempted to give full and complete answers with no hint of device or lack of candor. Her testimony is credited

A. Concerted Activity

In Meyers Industries (Meyers 1), 268 NLRB 493 (1984), ¹⁶ and Meyers Industries (Meyers 11), 281 NLRB 882 (1986), the Board established the test for determining whether an employee has been discharged for protected concerted activity under Section 8(a)(1) of the Act. As noted in *Diva*, *Ltd.*, 325 NLRB 822, 830 (1998):

In order to be found "concerted," an employee's activity must be engaged in with or on the authority of other employees, and not solely on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found 20 if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected concerted activity. [Meyers] at 497. In the second Meyers decision, the Board explained, in response to the court's remand, that individual activity could still be found to be concerted under the new test if there is some demonstrable linkage to group action. The Board reiterated its position that an individual employee's actions seeking to initiate, or to induce or to prepare for group action, as well as an individual employee's bringing truly group complaints to the attention of management, will be found concerted. The question of whether an employee has engaged in concerted activity is a factual one based on the totality of record evidence. Id. at 886-887. See also Ewing v. NLRB, 861 F.2d 353 (2d Cir. 1988). Since Meyers, the Board has found an individual employee's activities to be concerted when the grew out of prior group activity [Every Women's Place, 282 NLRB 413 (1986)]; when the employee acts, formally or informally, on behalf of the group [Oakes Machine Corp., 288 NLRB 456 (1988)]; or when an individual employee solicits other employees to engage in group action, even where such solicitations are rejected. [El Gran Combo de Pueffo Rico, 284 NLRB 1115 (1987), enfd. 853 F.2d 966 (1st Cir. 1988); Circle K Corp., 305 NLRB 932 (1991)]. However, the Board has long held that, for conversations between employees to be found protected concerted activity, they must look toward group action and that mere "griping" is not protected. See Mushroom Transportation Co. v. NLRB, 330 F.2d 683 (3rd Cir. 1964), and its progeny.

I find Rosa Mireles' conduct on or about August 12, was not concerted protected activity. I also find Rosa Mireles' complaint concerning the overtime bonus was made during the first week of the season and was not shown to have a casual nexus to any of Respondent's subsequent actions which are claimed to be violative of the Act. The criteria for the bonus to accrue was unquestioned and the complaint was expeditiously addressed without any indication it induced animus. I also find her complaints in 1996 to remote in time to be considered herein.¹⁷

Rosa Mireles' claim she complained about anything other than the loss of her bonus because she was late on August 12, is not credited. Her countenance when testifying was not direct and believable. She appeared to be tailoring her testimony to help her cause. While Rosa Mireles may have asked her sister Hilda Mireles whether she should raise the loss of her bonus to Rupe, this question was not linked to any group activity. There was no evidence any other employee lost a bonus because they were late. There is no evidence any other employee believed the rule requiring the loss of the bonus if an employee is late was unfair or was a group concern. *Diva*, *Ltd.*, supra.

I find Hilda Mireles' testimony concerning the comments she made to Ruiz about other employees having complaints unbelievable for the previously stated reasons. Moreover, the nature of the complaints was never detailed. It was never established that any employees had complaints other than Rosa Mireles or she was speaking on behalf of any other employee(s). On this record, it cannot be found that Rosa Mireles was speaking for anyone other than herself. Hilda Mireles was not shown to have shared Rosa Mireles' complaint concerning the bonus.

Rosa Mireles' comments to Monica Thomas, Ruiz, and Rupe made it clear she was complaining alone about the effect of a long standing policy that had not been shown to have been the subject of any other employee's complaint. I find counsel for the Acting General Counsel's reliance on Cub Branch Mining, Inc., 300 NLRB 50 (1990), unpersuasive. There was no credible evidence Rosa Mireles' actions on August 12, or any other date here pertinent, were "to induce or to prepare for group action." Mevers I and II. supra. There is no evidence of any group action as a result of Rosa Mireles's complaint. Such cloud of group action is dispelled by Hilda Mireles' admission she did not participate in Rosa Mireles' discussion with Rupe or Monica Thomas and some of the alleged conversations with Ruiz. Hilda Mireles' claim she alleged Rosa Mireles was addressing complaints of others who were afraid to talk for themselves is expressly discredited for the previously stated reasons. Moreover, there is no independent evidence of such complaints. Not one employee other than the Mireles sisters testified about the claimed unspecified complaints.

Hilda Mireles paid no attention to the conversation with Rupe. One of the reasons for her inattention was she did not understand English. This admission against the Charging Party's interest contradicts their claim Rosa Mireles got some unidentified employee to translate for her. This admission against interest also adds credence to Rupe's testimony, inasmuch as he recalled there was no such translator. Thus, Hilda Mireles' proximity to any conversations does not establish she made common cause with Rosa Mireles over the bonus or any other issue Rosa Mireles is found to have raised after the first week of the harvest season. On the contrary, her admission demonstrates she was not making common cause with her sister Rosa Mireles. I conclude there is no evidence this involved a group complaint. There is no claim Respondent's policy was

such a shortage with any other employees or that other employees experienced similar shortages. There is no evidence of prior group activity.

¹⁶ Remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. 281 NLRB 882 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

¹⁷ Assuming Rosa Mireles also complained about a shortage in her overtime box count, I would still conclude she was not engaged in concerted activity for there was no evidence Rosa Mireles discussed

contrary to law or was otherwise improper. Compare, *Boese Hilbum Electric Service Co.*, 313 NLRB 372 (1993). There is no persuasive evidence Rosa Mireles' actions on August 12 were in furtherance on any groups goals. There is no basis to infer, based on the credited evidence, Respondent had a reason to infer Rosa Mireles was speaking on behalf of other employees. *Wafter Brucker & Co.*, 273 NLRB 1306 (1984). Thus, it has not been established Respondent had knowledge of Rosa Mireles' concerted activity.

Additionally, there is no evidence Rosa Mireles' actions were efforts to enlist others or induce group action. There is no collective-bargaining agreement that is being addressed in her complaint. There is no evidence Rosa Mireles was making common cause with any other employee to reverse the bonus policy. There was no threat or claim Rosa Mireles was going to involve others in her petition to change the rule as it was applied to her. There is no evidence Rosa Mireles was taking action for the mutual aid an protection of any other employee.

B. Were Rosa and Hilda Mireles Unlawfully Terminated?

In the event the Board overturns my finding Rosa and Hilda Mireles did not engage in concerted activity, I find, for the foregoing reasons, that counsel for the Acting General Counsel failed to prove by the preponderance of the credible evidence that Rosa and Hilda Mireles' compliant(s) was a motivating factor in the employer's action.

There is evidence of pretext in the varying reasons advanced by Respondent's representatives for its actions and, the timing of Rosa and Hilda Mireles' cessation of employment raises suspicion. Respondent gave shifting reasons for the cessation of Rosa and Hilda Mireles' employment. Initially, Tom Thomas and Rupe claimed they were laid off. Tom Thomas also claimed Rosa Mireles would not have been retained for the postseason because she was not a generalist. Rosa Mireles' work history demonstrated she was a generalist and no one who had first-hand knowledge of her abilities claimed she lacked the skills and ability to be a generalist. Monica Thomas wrote a memorandum characterizing Rosa Mireles as a complainer and admitted engaging in hyperbole in the memorandum. Respondent also claimed Rosa Mireles did not like to work overtime but this bare claim was unsubstantiated. Ruiz claimed she needed all the handwrappers available for the postseason.

Such false and/or shifting reasons as well as the timing of the action, about 1 week after the bonus complaint, constitutes circumstantial evidence of unlawful motivation. However, after considering all the circumstances in this case, including the credibility of the witnesses, I do not find this circumstantial evidence establishes Respondent probably terminated Rosa and Hilda Mireles because Rosa Mireles complained about her bonus or any other working condition.

Neither Rupe nor Tom Thomas were directly involved in the cessation of the employment of Rosa and Hilda Mireles. Ruiz testified in an open and honest fashion about the events of August 19, and based on her demeanor, her testimony is credited. Ruiz and Rupe testified they did not strictly adhere to the post-season planning documents prepared by Tom Thomas and Rupe. Ruiz was the sole arbiter of who was retained. There was no evidence Ruiz relied on the Tom Thomas' and Rupe's plan-

ning documents that did not include Rosa Mireles as a postseason employee. The timing of any deed has import only where the company has taken action. In this case, I find, based on Ruiz' credited testimony, that Respondent did not take any action that resulted in the cessation of Rosa and Hilda Mireles' employment. I find Rosa and Hilda Mireles either voluntarily quit or, through their own misunderstanding, incorrectly believed they were laid off.

The Charging Party argues Rosa Mireles' seeking counsel because she felt she was treated unfairly is probative the testimony of Rosa and Hilda Mireles is credible and they were treated unfairly. I find such argument unpersuasive. If such reasoning prevailed, then there would be no need for hearings, the mere filing of a charge would be demonstrative of a violation. 18 Moreover, such action does not eliminate the possibility that Rosa and Hilda Mireles acted based on their misunderstanding of the events of August 19 or Rosa and Hilda Mireles changing their minds about quitting. There was no evidence concerning Rosa and Hilda Mireles' activities after August 19, they may have had jobs in the harvest of another fruit, or had planned a vacation or family obligations which precluded their working postseason. There is no basis on this record to conclude, contrary to the Charging Party's argument, that Rosa and Hilda Mireles had no reason to quit. Such argument is mere surmise, and disregards the possibility of a misunderstanding.

Ruiz' testimony she informed all the handwrappers she needed them for the postseason if the could stay is undisputed. Rosa and Hilda Mireles admitted they did not hear all of Ruiz' presentation, which was made in both Spanish and English. Ballesteros corroborated Ruiz' testimony, recalling Ruiz informed the assembled employees:

I'm going to use all of you because you know how to do the work, the job. But I want to know which one of you are going to stay all the way through because I don't want anyone to abandon the job halfway through. I need you all.

¹⁸ Similarly, Rosa Mireles'filing for unemployment insurance is not probative of the claim she was terminated. Rosa Mireles may have routinely filed for unemployment insurance yearly at the end of her employment with Respondent. Her actions in 1997 were not shown to be distinct from her past practice.

Ballesteros also testified Ruiz did not inform any of the employees that afternoon the season was over. There was no evidence Ruiz' statement was false or incorrect. Ballesteros testified in a direct manner without any indication of device or lack of candor; her testimony is credited. Bolstering this conclusion was Ruiz' candor, including her admission she did not recall seeing Rosa and Hilda Mireles the afternoon of August 19.

In contrast to the open manner Ruiz and Ballesteros exhibited while testifying, Rosa and Hilda Mireles appeared to be tailoring their testimony to fit their story. In fact, according to Hilda Mireles, Rosa Mireles went so far as to claim she had been told she was laid off prior to meeting with Ruiz the afternoon of August 19. Hilda Mireles appeared unsure when she testified and she and Rosa Mireles did not seem to be trying to present the facts in a complete and forthright manner. Hilda Mireles had admittedly poor recall of the events.

Buttressing this conclusion Hilda Mireles' testimony is not believable, is her testimony Monica Thomas never told her the season was coming to an end and if she wanted to work the postseason to talk with Ruiz. Yet in a declaration, she claimed she and Rosa Mireles learned separately they were laid off while working on the line. 19 She next claimed she and Rosa Mireles went to Ruiz to determine if they were to work the next day, which appears inconsistent. Hilda Mireles, admitted: "What happened is that what I testified on the statement was closer to the time and I remembered everything. Now it's hard for me to remember everything that happened." She further admitted: "Right now I don't remember if she told me that they had laid her off, or that she should speak to Griselda."

Moreover, Ruiz' testimony is inherently more probable. It was uncontroverted that handwrappers were the most skilled employees and there was a need for all the handwrappers who were willing to stay. There is no evidence Respondent had retained a sufficient number of handwrappers for the 1997 post-season. Respondent's claim all the other handwrappers who chose to stay were retained for the postseason was unrefuted. Hilda Mireles' claim Ruiz' less friendly actions toward her after August 19, as well as her and her nephew's rendition of their meeting with Rupe are likewise not credited. Ruiz' un-

controvected actions toward Rosa Mireles during a class at the local college belie any claimed hostility toward Rosa and Hilda Mireles.

In sum, I find counsel for the Acting General Counsel and the Charging Party failed to present a prime facie showing sufficient to support the inference Rosa and Hilda Mireles' engaged in concerted protected activities. If it is assumed, arguendo, they engaged in concerted protected activity, counsel for the Acting General Counsel and the Charging Party failed to establish such activity was a motivating factor in the Respondent's actions. They have failed to convincingly establish Rosa and Hilda Mireles were laid off. I therefore recommend the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

- 1. Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Respondent did not violate Section 8(a)(1) of the Act as alleged in the complaint.

ORDER²¹

It having been found and concluded the Respondent has not engaged in the unfair labor practices alleged in the complaint here, the complaint is dismissed in its entirety.

- Q. So did you tell Bob all that?
- A. Yes.
- Q. And what was the next thing that was said after that?
- A. Bob said he didn't know—he didn't know why they laid off my Aunt Hilda if the problem was with my mom.

Hilda Mireles did not claim she told Rupe others had complaints but were afraid to lodge them. Francisco Mireles appeared to be trying to present the version most favorable to his aunt and mother and thus his testimony is not credited.

²¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁹ There is no corroborating evidence Rosa and Hilda Mireles or any other employee was laid off by Monica Thomas on August 19 or any other date.

²⁰ Hilda Mireles testified that after Rupe gave her the receipt for the money for the car repair repayment "I thanked him, but I also told my nephew to tell him that it was unjust that Griselda would have told me to leave. If he remembered the day that my sister had talked to him . . . I told him that I was thinking that Gciselda had told me to leave or to go away because of that, or because I had participated in that conversation." Rupe replied: ". . . that Gciselda was—would decided who would leave and who would stay." Her nephew embellished his version, testifying:

My aunt told—my aunt told me to tell Bob that when my mom went to tell Griselda that they weren't paying her the money they had to pay her, my mom told her, and then Gciselda said why was she the only one. Then my aunt, my Aunt Hilda, came in and said that she wasn't the only one, that other people were just scared to complain.